

805 KAR 11:020. Requirements for certification of drug-free workplace.

RELATES TO: KRS 351.102, 351.1291, 351.182(7), (8), 351.185(1)(a)-(e), 351.186

STATUTORY AUTHORITY: KRS 351.070(13), 351.186

NECESSITY, FUNCTION AND CONFORMITY: KRS 351.070(13) authorizes the Secretary of the Environmental and Public Protection Cabinet to promulgate administrative regulations necessary and suitable for the proper administration of KRS Chapter 351. KRS 351.186 authorizes the Office of Mine Safety and Licensing to certify drug-free workplace programs implemented by an employer who is also a licensee, for the employer and licensee to be eligible to obtain a credit on the licensee's premium for workers' compensation insurance. This administrative regulation establishes the minimum requirements for certification of a drug-free workplace program.

Section 1. Review of Applications for Certification of a Drug-free Workplace Program. (1) The office shall review the application for certification of a drug-free workplace program and make a written decision concerning approval or denial of the application.

(2)(a) If the application has been denied, the notification of the decision shall include specific reasons for the denial.

(b) The notification of the decision to approve or deny the application shall be mailed to the licensee or applicant by certified mail, return receipt requested, to the address listed on the licensee's most recent mine license or mine license application.

(c) Service by certified mail shall be complete:

1. Upon delivery of the envelope;
2. Upon acceptance by any person eighteen (18) years or older at the licensee or application address;
3. Upon refusal to accept by a person at the licensee address;
4. Upon the U.S. Postal Service's inability to deliver the notification if properly addressed; or
5. Upon failure of the licensee or applicant to claim the envelope prior to its return to the office by the U.S. Postal Service.

(d) The return receipt or envelope shall be proof of acceptance, refusal, inability to deliver, or failure to claim the envelope.

(3) The licensee may appeal the rejection as established in 825 KAR 1:020, Section 4.

Section 2. Approval and Certification of Drug-Free Workplace Program. The office may approve an application for, and issue a certification of, a drug-free workplace program to an employer, if the drug-free workplace program complies with all of the following minimum requirements:

(1) The program includes alcohol and substance abuse education and awareness training for employees and supervisors which:

(a) Provides to all employees written materials explaining the licensee's policies and procedures with respect to the drug-free workplace program;

(b) Provides each employee at least one (1) hour of initial, and at least thirty (30) minutes refresher each year thereafter, of alcohol and substance abuse education and awareness training. The training shall include, at a minimum, information concerning:

- a. Alcohol and drug testing;
- b. The effects of alcohol and drug use on an individual's health, work, and personal life;
- c. The disease of alcohol or drug addiction;
- d. Signs and symptoms of an alcohol or drug problem;
- e. The role of co-workers and supervisors in addressing alcohol or substance abuse; and

f. Referrals to an employee assistance program.

2. The alcohol and substance abuse awareness and education training provided by the office pursuant to KRS 351.102, 351.106, and 351.1291 as part of certification or refresher training shall satisfy this requirement if the licensee provides verification of all employees' attendance at the training program. "The Mine Safety and Health Administration Form 5000-23" required by 805 KAR 7:030 shall serve as this verification; and

(c) Provides all supervisory personnel, in addition to the training specified in paragraph (b) of this subsection, with thirty (30) minutes each year of alcohol and substance abuse education and awareness training.

1. The training shall include, at a minimum, information on:

- a. Recognizing the signs of alcohol and substance abuse in the workplace;
- b. How to document signs of employee alcohol or substance abuse;
- c. How to refer employees to an employee assistance program or other alcohol and substance abuse treatment; and

d. Legal and practical aspects of reasonable suspicion testing for the presence of drugs and alcohol. The alcohol and substance abuse education and awareness training provided by the office pursuant to KRS 351.106(3) and 351.1291(4) as part of certification or refresher training may satisfy this requirement if the licensee provides verification of attendance of all supervisory personnel at the training program. "The Mine Safety and Health Administration Form 5000-23" required by 805 KAR 7:030 shall serve as this verification;

(2) "Reasonable suspicion testing shall be based on a belief that an employee is using or has used drugs or alcohol in violation of the employer's policy, drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience, training, or education. The reasonable suspicion testing shall be based upon:

(a) While at work, direct observation of drug or alcohol use or of the physical symptoms or manifestations of being under the influence of a drug or alcohol;

(b) While at work, abnormal conduct, erratic behavior, or a significant deterioration in work performance;

(c) A report of drug or alcohol use provided by a reliable and credible source;

(d) Evidence that an individual has tampered with a drug or alcohol test during employment with the current covered employer;

(e) Information that an employee has caused, contributed to, or been involved in an accident while at work; or

(f) Evidence that an employee has used, possessed, sold, solicited, or transferred illegal or illicit drugs or used alcohol while on the covered employer's premises or while operating the covered employer's vehicle, machinery, or equipment.

(3) The program includes breath alcohol and urine drug testing to which job applicants or employees shall be required to submit at the following times:

(a) For urine drug testing:

1. After conditional offer of employment;

2. After being selected using a statistically valid, unannounced random method;

3. Upon reasonable suspicion of prohibited drug use;

4. At Follow-up testing at least once per quarter for one (1) year after the employee's successful completion of an employee assistance program for drug-related problems, or a drug rehabilitation program, or as recommended by the person administering the drug rehabilitation program; and

5. Following a mine accident on the licensed premises which requires off-site medical attention be given to a person.

(b) For breath alcohol testing:

1. After conditional offer of employment;
 2. Upon reasonable suspicion of prohibited alcohol use;
 3. Following a mine accident on the licensed premises which requires off-site medical attention be given to a person; and
 4. Follow-up testing at least once per quarter for one (1) year after the employee's successful completion of an employee assistance program for alcohol-related problems, or an alcohol rehabilitation program, or as recommended by the person administering the alcohol rehabilitation program;
- (4) The office may issue a certification for a program that provides for alcohol and drug testing of other fluids or products of the human body capable of revealing the presence of drugs or alcohol if the testing is as accurate as, and equivalent to, breath alcohol and urine drug testing and complies with this section of this administrative regulation;
- (5) The program includes the minimum testing protocol as established in KRS 351.182(7) and (8);
- (6) The program provides that the collection of samples and administration of drug and alcohol tests shall follow all standards, procedures and protocols established by the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Administration (SAMHSA);
- (7) The program provides that the test results have been performed by a qualified laboratory;
- (8) The program includes medical review of test results as follows:
- (a) 1. All test results shall be submitted for medical review by the medical review officer (MRO), who shall consider the medical history of the employee or applicant, as well as other relevant biomedical information.
 2. If there is a positive test result, the employee or applicant shall be given an opportunity to report to the MRO the use of any prescription or over-the-counter medication.
 - (b) If the MRO determines that there is a legitimate medical explanation for a positive test result, the MRO may certify that the test results do not indicate the unlawful use of alcohol or a controlled substance. If the MRO determines, after appropriate review, that there is not a medical explanation for the positive test result other than the unauthorized use of alcohol or a prohibited drug, the MRO shall refer the individual tested to an employee assistance program or to a personnel or administrative officer for further proceedings in accordance with the licensee's drug-free workplace program.
 - (c) Determinations concerning the use of alcohol or a controlled or illicit substance shall comply with all procedures outlined in the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA) "Medical Review Officer Manual for Federal Agency Workplace Drug Testing Programs";
- (9) The program includes an employee assistance program (EAP) for its employees and supervisory personnel.
- (a) The licensee may establish the EAP as a part of its internal personnel services or may contract with an entity that provides EAP services.
 - (b) Employer licensees' participation in a consortium shall satisfy this requirement; and
- (10) The program includes controlled-access maintenance at the coal mine of records including the names and position titles of all employees and supervisory personnel trained under the program, and the names of all persons who presented alcohol and substance abuse training, for review by the office.
- (11) The program includes a requirement that all independent contractors required to be certified pursuant to KRS 351.102 comply with the provisions of the licensee's Drug-Free Workplace Program.

Section 3. Revocation of Certification. (1) The office shall revoke a certification issued pursuant to Section 2 of this administrative regulation if the licensee discontinues or fails to maintain its drug-free workplace program in compliance with the requirements of 805 KAR Chapter 11.

(2)(a) The notification of revocation shall include specific reasons for the revocation and shall be mailed to the licensee by certified mail, return receipt requested, to the address listed on the licensee's most recent mine license.

(b) Service by certified mail shall be complete:

1. Upon delivery of the envelope;
2. Upon acceptance by a person eighteen (18) years or older at the licensee or application address;
3. Upon refusal to accept by a person at the licensee address;
4. Upon the U.S. Postal Service's inability to deliver the notification if properly addressed; or
5. Upon failure to claim the envelope prior to its return to the office by the U.S. Postal Service.

(c) The return receipt or envelope shall be proof of acceptance, refusal, inability to deliver, or failure to claim the envelope.

Section 4. Confidentiality of Records. Records of drug or alcohol test results, written or otherwise, received by the licensee shall be confidential communications and shall not be disclosed by the licensee to any party other than the office, except under the circumstances listed in KRS 351.185(1)(a) through (e).

Section 5. Denial or Revocation of Certification. A licensee whose application for certification has been denied or revoked may file a petition of appeal in accordance with the provisions of 825 KAR 1:020, Section 4.

Section 6. Incorporation by Reference. (1) The "Medical Review Officer Manual for Federal Agency Workplace Drug Testing Programs" issued by the Department of Health and Human Services, November 1, 2004 Edition (DHHS Publication No. (ADMINISTRATIVE REGULATION) 88-1526) is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Office of Mine Safety and Licensing, 300 Sower Boulevard, Frankfort, Kentucky 40601, Monday through Friday 8:00 a.m. to 4:30 p.m. (33 Ky.R. 3130; Am. 3419; 34 Ky.R. 251; eff. 8-23-07; TAm eff. 7-6-2016.)